No. 99-70

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IN THE

Supreme Court of the United States

STEVEN W. BENNETT; EDMUND L. GILLOOLEY; JOSEPH L. ALESSANDRINI, JR.; FRANK W. HEWITT; RICHARD E. SEMARAD; WARREN E. KAYLOR, Individually and on behalf of all other similarly situated; JOANNE KELLY, Individually and on behalf of all others similarly situated; GEORGE E. GALE, III, Individually and on behalf of all other similarly situated,

Petitioners,

v.

CONRAIL MATCHED SAVINGS PLAN ADMINISTRATIVE COMMITTEE; DEBORAH A. MELNYK; JOHN/JANE DOES 1-10; CONSOLIDATED RAIL CORPORATION MATCHED SAVINGS PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners are former employees of the Consolidated Rail Corporation ("Conrail"), some of whom are former participants in the Consolidated Rail Corporation Matched Savings Plan (the "Plan"). The Plan was a 401(k) plan permitting participants the right to make tax deferred contributions. To foster employee participation, the Plan included an employee stock ownership plan or "ESOP" feature that allowed Conrail to "match" participant contributions to their individual accounts with Conrail stock. In response to a tender offer and following a takeover fight for Conrail, all of the unallocated stock in the ESOP was sold at a premium, yielding surplus assets that, in turn, were allocated to then current Conrail employees (consistent with the Plan's amended terms and Internal Revenue Service rulings so restricting the allocation of the surplus). None of the surplus reverted to Conrail and/or its buyers. Each petitioner received all amounts promised under the terms of the Plan. In other words, these petitioners were immediately and fully vested in their account balances, including any Conrail stock previously allocated to them, and in all investment gains on their accounts.

1. Whether petitioners have any legally-cognizable interest in the surplus assets of a pension plan after this Court's opinion in *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755 (1999), ruling that vested pension plan participants paid all of the benefits promised to them have no right to plan surplus?

2. Whether Conrail's amendment and termination of the Plan can properly be challenged as a fiduciary breach, despite this Court's rulings in *Curtiss-Wright v. Schoonegjongen*,

514 U.S. 73 (1985), and *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), holding that such actions are taken in a plan sponsor's "settlor" capacity, and are immune from challenge under ERISA's fiduciary standards?

3. Whether petitioners stated a claim for relief under ERISA section 4044(a), 29 U.S.C. § 1344(a), notwithstanding the fact that all of the requirements of that provision have been met?

4. Whether a repealed regulation and vague allegations of inequity can upset the plain language of an employee benefit plan?

5. Whether the Internal Revenue Code's "partial termination" rule provides a remedy to these petitioners, again notwithstanding the fact that the petitioners received all of the benefits promised to them (the only remedy available under the express language of the Code)?

PARTIES TO THE PROCEEDING

The petitioners are Steven W. Bennett; Edmund L. Gillooley; Joseph L. Alessandrini, Jr.; Frank W. Hewitt; Richard E. Semarad; Warren E. Kaylor; Joann Kelly; and George E. Gale, III.

The respondents, collectively referred to as "Conrail," are the Conrail Matched Savings Plan Administrative Committee; its members, Deborah A. Melynk and John/Jane Does 1-10; and the Consolidated Rail Corporation Matched Savings Plan.

STATEMENT PURSUANT TO RULE 29.6

Consolidated Rail Corporation ("Conrail") is a wholly-owned subsidiary of Conrail, Inc. ("CRR"). Norfolk Southern ("Norfolk Southern") Corporation has a fifty-eight percent equity interest and fifty percent voting interest in CRR. CSX Corporation ("CSX") has forty-two percent equity interest and a fifty percent voting interest in CRR.

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STATEMENT OF THE CASE

Petitioners are former employees and participants in the Consolidated Rail Corporation Matched Savings Plan (the "Plan") who, as detailed in their Complaint and long before the events giving rise to this litigation, resigned their Conrail employment in exchange for enhanced severance and retirement benefits. *See* Petitioners' App. ("App.") at 47a-48a. Despite having severed their Conrail employment and, in some instances, notwithstanding the fact they surrendered their participant status (*id.* at 48a), petitioners maintain that they should share in the allocation of Plan surplus made only to current employees. It is undisputed, however, that petitioners received all the benefits promised to them along with all of the investment gains on those assets. Moreover, the money petitioners seek was allocated to Conrail employees having W-2 compensation in 1996, 1997 and 1998,[1] to ensure the continuing tax qualification of the Plan and to cushion the blow for those at risk of losing their Conrail jobs following Conrail's acquisition by CSX and Norfolk Southern. Neither Conrail nor its acquirers received any of the controverted surplus as a reversion.

More specifically, the Plan is a "defined contribution" pension retirement savings plan or "individual account" pension plan as defined in ERISA section 3(34), 29 U.S.C. § 1002(34), and included an employee stock ownership plan or "ESOP."[2] The ESOP provided a mechanism to allow

1. As some of the petitioners worked for Conrail in 1996, they received a reduced allocation of the surplus commensurate with their shorter employment period.

2. In a defined contribution pension plan, "employees are not promised any particular level of benefits; instead, they are promised (Cont'd)

Conrail to "match" participant contributions to their accounts, by allocating Conrail stock to those accounts pursuant to a Plan formula. To establish the ESOP, the Plan borrowed $290 million from Conrail to purchase Conrail preferred stock, which was held, in the parlance of ESOPs, in an "unallocated suspense account."[3] Each year, as the payments were made to amortize the loan, shares were released and allocated to the individual accounts. *Cf. Qualified Retirement* at § 3.34 [B] ("There must be a plan provision for a ratable release of securities from encumbrance as the loan is paid off."). In other words, and according to the Court of Appeals, "[p]articipating employees contributed a portion of their salary into individual accounts and Conrail matched these contributions with stock from the unallocated account." *See* App. at 7a.

The Plan allowed for matching of participant contributions with shares of Conrail stock at a level equal to one hundred percent of the participant's contributions to the Plan for the year, to a maximum of six percent of earnings.

(Cont'd)
only that they will receive the balances in their individual accounts." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 637 n.1 (1990). Moreover, "[a]n ESOP is an ERISA plan that invests primarily in 'qualifying employer securities.' " *Kuper v. Iovenko*, 66 F.3d 1447, 1457 (6th Cir. 1995).

3. Such an arrangement gives rise to what is known as a "leveraged ESOP." *Cf.* Michael J. Canan, *Qualified Retirement and Other Employee Benefits*, § 3.35[A] (West 1997) ("*Qualified Retirement*") ("The shares acquired by the ESOP from the proceeds of the loan are typically placed in an unallocated suspense account and as the loan is repaid the shares are allocated to the individual account[s] of plan participants. ESOPs permitted to engage in transactions of this type are commonly referred to as 'leveraged ESOPs.' ").

In 1997, all of Conrail's stock was acquired by the Norfolk Southern Corporation ("NS") and CSX Corporation ("CSX") in a series of cash tender offers at prices substantially in excess of those prior to the takeover battle in late 1996. *See* App. at 56a-57a. Shortly before the close of the final tender offer for Conrail, shares of Conrail preferred stock were used to repay the ESOP loan, and the balance of the stock was converted to cash pursuant to the tender. The approximately $537 million in remaining cash proceeds were credited to the unallocated suspense account, renamed the "Unallocated Proceeds Account." This "surplus" money is the subject of petitioners' Complaint.

Conrail, as Plan sponsor and in its "settlor" capacity, amended the ESOP, on June 12, 1997, effective, as here relevant, on January 1, 1996, to provide for the allocation and distribution of the Unallocated Proceeds Account to those participants who, during 1996, 1997 and 1998, earned compensation from Conrail as an "employee." The amendments to the Plan, allocating the surplus assets to those employees having W-2 compensation in the stated years, insured that the Plan would remain tax-qualified, as the petitioners *admitted* in their Complaint.[4] In other words, by amending the Plan to allocate surplus assets to its then current employees, Conrail conformed to the Internal Revenue Code sections governing tax qualified benefits plans, limiting "annual additions" to $30,000 or 25 percent of a participant's compensation, whichever is smaller.[5]

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4. *See* App. at 59a (the allocation "represent[s] the maximum possible allocation under tax regulations" for each of the relevant years).

5. *See* 26 U.S.C. § 415(c). Prior to the relevant Plan amendments, the Internal Revenue Service consistently ruled that (Cont'd)

If, instead, Conrail had allocated the ESOP surplus to individuals without regard to section 415, as petitioners' varied arguments necessarily would require, the entire Plan could have been disqualified by the Internal Revenue Service, with significant adverse consequences for both the employer and employees. *See* 26 C.F.R. §§ 1.402(b); 1.404(a)-12(b)(1). To avoid the possibility of such a result, on January 29, 1998, Conrail received a "determination letter" from the Internal Revenue Service, pursuant to 26 C.F.R. § 601.201(a)(3), ruling that the Plan remained tax qualified notwithstanding the amendments spawning this litigation. As part of this process, the Internal Revenue Service considered participant protests raising many of the same arguments pressed in this litigation, concerning the supposed unfairness of the controverted amendments. Despite the fact that the Internal Revenue Service permitted the Plan changes, after considering petitioners' challenges based on the claimed inequities, petitioners now maintain that Conrail violated no fewer than ten provisions of statutory law and regulatory edict.

At the end of the day, just a few undisputed facts are material to the Court's disposition of the instant petition. First, these petitioners, as participants in a defined contribution savings plan, were immediately vested in all of

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the allocation to participants of the net proceeds from the sale of previously unallocated ESOP stock constitutes "annual additions" subject to the limitations of Internal Revenue Code section 415(c). *E.g.*, *Priv. Ltr. Rul. 9648054* (Nov. 29, 1996), 1996 WL 685187 (I.R.S.); *Priv. Ltr. Rul. 9640027* (Oct. 4, 1996), 1996 WL 564598 (I.R.S.); *Priv. Ltr. Rul. 9638046* (Sept. 20, 1996), 1996 WL 532898 (I.R.S.); *Priv. Ltr. Rul. 9625045* (June 21, 1996), 1996 WL 340348 (I.R.S.); *Priv. Ltr. Rul. 9416043* (April 22, 1994), 1994 WL 141568 (I.R.S.).

their contributions to each of their individual savings accounts consistent with the Plan, along with all of the investment gains on those assets. This means, in turn, that they received all the benefits promised them under the terms of the Plan. Next, petitioners, former Conrail employees, cannot point to any Plan provision even remotely suggesting they have some right to the assets earmarked for matching contributions of then current and future Conrail employees (had the Plan continued). Lastly, the allocation of the surplus to the individual accounts was done in accordance with the express mandate of the amended Plan; the allocation of the money involved no discretionary activity; and neither Conrail nor its buyers received a reversion of Plan assets.[6]

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6. Pursuant to Supreme Court Rule 15.2, Conrail respectfully submits that the statement, at pages 2, 14 and 15 of the Petition, that some of the surplus recipients "had never been participants in the ESOP" is an error. To share in the surplus allocation one had to be both a Conrail employee and a Plan participant. Moreover, petitioners misquote a letter from David M. LeVan, then chairman, president and CEO of Conrail, addressed to the recipients of the ESOP allocation. *See* Petition at 7. The cited provision, read in its entirety and without the misleading insert supplied by petitioners, underscores Mr. LeVan's belief that it was the then current Conrail employees who deserved the surplus:

> A great deal of hard work went into achieving this result. The primary contributor, however, was the hard work that *you* put into this company that helped create tremendous value for shareholders. When we combine that hard work with the willingness to take the investment risk of the ESOP, *the current employee shareholders in the ESOP, who are most at risk in this transaction, are able to reap benefits along with our other shareholders.*

REASONS FOR DENYING THE WRIT

Petitioners seek pension plan surplus notwithstanding this Court's stern rebuke of such claims, just six months ago in *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755 (1999). In *Jacobson*, this Court rejected the claims of former employees challenging the plan sponsor's use of pension plan surplus to fund additional benefits for current employees, despite the fact that the underlying plan assets were derived in part from participant contributions and were used both to generate the surplus and to fund the benefits of the former employees. Although these petitioners received all of the benefits promised them, along with the investment gains on their account balances, they now claim an interest in money previously segregated for matching the contributions of Conrail employees. *Jacobson* plainly holds that these petitioners have no legally cognizable interest in the pension surplus, and the Third Circuit's opinion properly affirmed the dismissal of these claims. As such, there are no compelling or important reasons requiring this Court to address the issues squarely, and very recently, decided in *Jacobson*.

Moreover, this Court has repeatedly recognized the latitude enjoyed by a benefit plan sponsor to define a plan's terms without regard for ERISA's fiduciary standards. Petitioners' fiduciary breach claims challenge the terms of the amended Plan, and run headlong into this Court's repeated ruling, articulated in the context of rejecting claims for pension plan surplus, that such matters are left to the unbridled discretion of the corporation in its "settlor" capacity. *E.g.*, *Curtiss-Wright v. Schoonegjongen*, 514 U.S. 73 (1985); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996).

The cases petitioners cite in support of their claimed split in Circuit authority involve discretionary activity by plan fiduciaries and are readily distinguishable. The Third Circuit's opinion simply applied this Court's clear rulings in holding that Conrail's amendment of the Plan was not a fiduciary function, and the surplus thus remains outside petitioners' grasp.

Next, petitioners' reliance on ERISA section 4044(a), 29 U.S.C. § 1344(a), is misplaced as a careful reading of that provision reveals that all of its requirements have been satisfied, mindful of the fact, once again, that petitioners received the benefits owed them. Further, reliance on a *repealed* regulation is improper and petitioners cannot upset the plain language of the Plan with vague allegations of unfairness and a claimed right to "equitable proration" of the surplus assets. None of these supposed bases for a remedy finds support in the specific text of ERISA, and to permit such claims in these circumstances would undermine this Court's repeated ruling that the design of a benefits plan is immune from judicial scrutiny. Lastly, petitioners' reliance on the "partial termination" rules of the Internal Revenue Code is equally misplaced as the unequivocal statutory command limits relief to plan participants who, quite unlike these petitioners, are not vested in their benefits at the time of the partial termination. The Third Circuit correctly analyzed and then dismissed each of petitioners' claims, consistent with the clear mandate of this Court's case law and the express limitations in ERISA. The Petition should be denied.

I.

SURPLUS PLAN ASSETS ARE BEYOND PETITIONERS' REACH

Jacobson, decided only six months ago, dictates that petitioners have no cognizable interest in the surplus assets designated for matching the contributions of Conrail employees. This Court in *Jacobson* held that a participant in a defined benefit pension plan, having received all of the benefits promised under the plan's terms, enjoys no interest in the underlying assets used to fund the benefits. "Since a decline in the value of a plan's assets does not alter accrued benefits, members similarly have no entitlement to share in a plan's surplus — even if it is partially attributable to the investment growth of their contributions." *Jacobson*, 119 S. Ct. at 761-62.

Like the plaintiffs in *Jacobson*, these petitioners "proceed on the erroneous assumption that they had an interest in the Plan's surplus." 119 S. Ct. at 760-61. Petitioners, as participants in a defined contribution plan, received all amounts promised them under the Plan's terms. Equally important, no reversion to Conrail and/or CSX and Norfolk Southern took place; rather, the surplus assets were allocated to Conrail's participant-employees.[7] Like the claims in *Jacobson*, "[t]hese claims fail because the 1991

7. Aside from the fact that the distribution to each employee was required by Internal Revenue Code section 415, petitioners' assertion that the allocation method "discriminated" in favor of highly compensated Conrail employees is of no moment. *E.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (ERISA does not mandate that "employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits."). *See also Jacobson*, 119 S. Ct. at 763 (same).

amendment did not affect the rights of pre-existing Plan participants and Hughes did not use the surplus for its own benefit." *Id.* at 761.[8] The fact that the Conrail Matched Savings Plan was a defined contribution plan further underscores the petitioners' right only to the money in their accounts, and precludes entirely any claim to the surplus assets reserved for future "matching" of employee earnings. This Court in *Jacobson* rejected the claims of former employees seeking the investment gains on the very assets used to fund their benefits and allocated by the plan sponsor to Hughes' then current employees. It necessarily follows that these petitioners, whose interest in the unallocated surplus, if any, was dramatically more attenuated then that of the plaintiffs in *Jacobson*, have no legally cognizable interest in the surplus they seek.[9] The Third Circuit's ruling

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8. As *Jacobson* recognized, defined contribution plan participants are immediately vested in their accounts, ensuring the payment to them of all the benefits promised in the Plan:

> A defined contribution plan "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account." ERISA § 3(34); 29 U.S.C. § 1002(34). "[U]nder such plans, by definition, there can never be an insufficiency of funds in the plan to cover promised benefits," since each beneficiary is entitled to whatever assets are dedicated to his individual account.

Jacobson, 199 S. Ct. at 761 (quoting *Nachman*, 446 U.S. at 364 n.5). The ERISA definitional section quoted in *Jacobson* alone points up the futility of petitioners' arguments. ERISA requires only that these petitioners receive their account balances, nothing more.

9. Petitioners' contention that Conrail violated ERISA's "anti-inurement" provision, 29 U.S.C. § 1103(c)(1), and the "exclusive

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purpose" rule, 29 U.S.C. § 1104(a)(1)(A), was also resolved in *Jacobson*. Given the fact that surplus money was paid to participants, reliance on the anti-inurement rule is misplaced:

> As the language makes clear, the section focuses exclusively on whether fund assets were used to pay pension benefits to plan participants, without distinguishing either between benefits for new and old employees under one or more benefit structures of the same plan, or between assets that make up plan's surplus as opposed to those needed to fund the plan's benefits. Respondents do not dispute that Hughes used fund assets for the sole purpose of paying pension benefits to plan participants.

119 S. Ct. at 763. Here, all of the surplus went to Plan participants, none to the employer and, as such, ERISA section 403(a)(1), 29 U.S.C. § 1103(c)(1), is wholly irrelevant to this dispute. Likewise, the exclusive purpose rule states only that a fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and beneficiaries." 29 U.S.C. § 1104(a)(1). Aside from whether fiduciary standards apply to the amendment and termination of the Plan, all of the surplus was allocated to participants; hence, the exclusive purpose rule is similarly inapposite. Moreover, the fact that some of the individuals responsible for the amendments were also Plan participants does not alter the result. Again, assuming that fiduciary standards somehow apply to the transaction, ERISA explicitly provides that an employee can act as a fiduciary. 29 U.S.C. § 1108(c)(3). *See also Herdrich v. Pegram*, 154 F.3d 362, 381 (7th Cir. 1998) (ERISA section 408(c)(3) [29 U.S.C. § 1108(c)(3)] is "an unorthodox departure from the common law rule against dual loyalties"), *petition for cert. filed*, 67 U.S.L.W. 3578 (U.S. June 4, 1999) (No. 98-1949) (quoting *Donovan v. Bierwirth*, 538 F. Supp. 463, 468 (E.D.N.Y. 1981)).

is consistent with *Jacobson* and there are no reasons, compelling or otherwise, to revisit these issues here.

II.

FIDUCIARY STANDARDS DO NOT APPLY

This Court has repeatedly held that plan design issues, like Conrail's election to allocate the surplus to then current employees, are business decisions left unregulated by ERISA. Those opinions are best understood within the larger context of this Court's rulings that ERISA's primary purpose is to guarantee the payment of only those benefits promised in a plan. Having received all of the benefits promised to them, ERISA affords these petitioners no additional basis for relief and the Third Circuit correctly affirmed the dismissal of the fiduciary breach claims.

"ERISA . . . seeks to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). In other words, "ERISA tries to 'make as certain as possible that pension fund assets [will] be adequate' to meet expected benefits payments." *Id.* (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980)). Consistent with this narrow reading of the statute, this Court also recently warned that ERISA "should not be supplemented by extra-textual remedies." *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 764 (1999).[10] This Court

10. *See also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) ("The authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute."); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (noting that ERISA was "crafted with such evident care" that courts must be especially reluctant to "tamper" with its express terms).

has further held that ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. These limitations on ERISA's remedial scope were properly relied upon in the Third Circuit's opinion. According to Judge Roth, "ERISA does not confer substantive rights on employees; rather it ensures that they will receive those benefits that the employers have guaranteed to them." *See* App. at 14a.

Such limitations on ERISA's statutory reach are driven, in part, by the recognition that the level or content of benefits is left "largely to the private parties creating the plan." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981).[11] Proper recognition of a plan sponsor's latitude in determining the terms of a benefits plan leads, in turn, to restraints on the scope of ERISA's fiduciary requirements, as next explained. More specifically, this Court's recent opinions in *Spink* and *Jacobson* hold that the challenged modifications to the Conrail Plan, amending the Plan design to allocate these surplus assets to then current employees, were undertaken by Conrail in its corporate capacity and in pursuit of judicially-endorsed objectives, and are not subject to scrutiny under ERISA.

Extending the rule of *Curtiss-Wright v. Schoonegjongen*, 514 U.S. 73 (1985), in the context of a challenge to the use of pension plan surplus to fund early retirement benefits, *Spink* holds that the creation, amendment and termination of pension plans are outside the reach of ERISA's fiduciary standards, section 404:

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11. *See also Spink*, 517 U.S. at 887 ("Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.").

> Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries. As we said with respect to the amendment of welfare benefits plans in *Curtiss-Wright Corp. v. Schoonegjongen*, . . . "[e]*mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans*." When employers undertake those actions, they do not act as fiduciaries . . . but are analogous to the settlors of a trust. . . .

Spink, 517 U.S. at 890 (citations omitted) (emphasis added). Moreover, "[w]e see no reason why the rule of *Curtiss-Wright* should not be extended to pension benefit plans." *Id.*[12] In sum, "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Id.* ERISA does not regulate Conrail's corporate decision to allocate the money to its employees. This is precisely what the Third Circuit held, affirming the dismissal of petitioners' fiduciary breach claims. *See* App. at 19a ("Fiduciary duties attach to the actions of employers 'only when and to the extent' that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA.").[13]

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12. *See also Jacobson*, 119 S. Ct. at 763 ("Our conclusion [refusing to examine adoption, amendment and termination of benefits plans under fiduciary standards] applies with equal force to persons exercising authority over a contributory [pension] plan, a noncontributory [pension] plan, a noncontributory [pension] plan, or any other type of plan.").

13. Quoting *Blaw Knox Retirement Income Plan v. White Consol. Indus.*, 998 F.2d 1185, 1189 (3d Cir. 1993).

Spink further recognized that narrow application of fiduciary standards leaves an employer free to pursue any number of legitimate corporate objectives through the sponsorship of a pension plan:

> [A]mong the "incidental" and thus legitimate benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily.

Spink, 517 U.S. at 893-94.[14] In sum, the amendment and termination of the Matched Savings Plan was undertaken by Conrail in its corporate or settlor capacity, in pursuit of

14. The *Jacobson* opinion further explained that matters of plan design, like the ultimate allocation of the ESOP surplus, are left to the employer:

> In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets. ERISA's fiduciary duty requirement simply is not implicated where [a corporation], acting as the plan's settlor, makes a decision regarding the form or structure of the plan such as who is entitled to receive plan benefits and in what amounts, or how such benefits are calculated.

Jacobson, 119 S. Ct. at 763.

entirely legitimate objectives, *e.g.*, the payment of additional deferred compensation to those at risk of losing their Conrail employment as a result of the takeover, and these actions are entirely immune from scrutiny under ERISA's fiduciary standards.

Nevertheless, petitioners argue that the "implementation" of the termination decision is subject to fiduciary standards and the Third Circuit's ruling conflicts with other Circuit Court opinions. Petitioners misstate the facts, and the conflict they posit is illusory. First, it is undisputed that the surplus assets were allocated by simply following the amended Plan's terms — the money was allocated to the accounts based upon the Plan formula, and no discretionary activity was involved. Petitioners do not challenge any actions taken in the administration of the Plan's amended terms; rather, they complain about the terms of the amended Plan. Again, petitioners cannot contest the Plan's terms because the "form or structure" of the Plan cannot be upset in these proceedings. *Jacobson*, 119 S. Ct. at 763.

Fiduciary activity, on the other hand, requires the exercise of discretionary authority over a plan and/or "management or disposition of [plan] assets." 29 U.S.C. § 1002(21)(A).[15] Petitioners' own authority points up nicely

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15. *See also Jacobson*, 119 S. Ct. at 763 ("fiduciary duties . . . consist of such actions as the administration of the plan's assets"); *Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996) ("amending or terminating a plan . . . cannot be an act of plan 'management' or 'administration' "); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985) (Fiduciary duties include "the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosures of specified information, and the avoidance of conflicts of interest.").

the distinction and, viewed through this corrective lens, does not conflict with the Third Circuit's ruling. For example, the Ninth Circuit's opinion in *Waller v. Blue Cross of California*, 32 F.3d 1337 (9th Cir. 1994), held that the act of selecting annuity providers to fund benefits following the termination of a defined benefit pension plan is properly subject to fiduciary standards. Evaluation and selection of such insurers, to which the entirety of participants' lifetime benefit obligations are effectively delegated, constituted "the quintessential exercise of 'discretionary control.' " 32 F.3d at 1342.[16]

Once again, the surplus assets were allocated consistent with the terms of the Plan's amended design and there was absolutely no discretionary activity involved. The district court's opinion in *District 65, United Automobile Workers v. Harper & Row Publishers, Inc.*, 670 F. Supp. 550 (S.D.N.Y. 1987), cited by petitioners in support of their contention that the challenged actions should be measured by fiduciary standards, only further underscores the point that adherence to a plan's terms, without any exercise of discretionary authority, is not fiduciary activity. "Harper & Row is also liable as a fiduciary, *because its acts with respect to implementing the termination decision required*

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16. Moreover, these former Conrail employees received all of the benefits promised them and, as such, the policy concerns animating the Ninth Circuit's ruling are inapplicable to this dispute. " 'Congress' primary purpose in enacting this comprehensive legislative scheme was to prevent the great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated.' " *Waller*, 32 F.3d at 1343 (quoting *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1423 (9th Cir. 1986)).

discretionary decisions on its part." *Id.* at 556 (emphasis added).[17]

17. The Second Circuit's opinion in *Financial Insts. Retirement Fund v. Office of Thrift Supervision*, 964 F.2d 142 (2d Cir. 1992), offered in further support of petitioners' claim to a Circuit split, is yet another decision involving a discretionary allocation of plan assets and, as such, does not conflict with the Third Circuit's opinion in *Bennett*. Simply stated, at issue in *Financial Institutions* was the plan trustees' decision to allocate plan assets to one of two possible recipients, following a "deliberative process." *Id.* at 149. More specifically, the challenged actions were the fiduciaries' election to turn over plan assets to certain banks, over the competing claim of the Office of Thrift Supervision ("OTS"), after a dispute arose over surplus assets left in a multi-employer pension fund. The opinion in *Mutual Life Ins. Co. v. New York v. Yampol*, 840 F.2d 421 (7th Cir. 1988), similarly does not conflict with *Bennett*. *Yampol* addressed the question of whether the assignee of the Illinois Director of Insurance, charged with the responsibility for liquidating a self-insured welfare plan, was a fiduciary with standing to sue under ERISA. Once again, that fiduciary authority was grounded in the discretionary actions likely to be undertaken in furtherance of the liquidation:

> Among other rights and responsibilities the Director may, subject to the approval of the state court, sell or otherwise dispose of the real and personal property of the Trust. He may also sell or compromise all doubtful or uncollectible debts or claims of the Trust, again with the approval of the state court. The Director may also solicit contracts whereby solvent companies assume the liabilities owing to the Trust's policyholders and such other creditors "as may be possible."

Yampol, 840 F.2d at 424. In sum, the Third Circuit's ruling, that the termination of the Conrail Plan is not subject to fiduciary standards, is consistent with *Spink* and *Jacobson*, and the Circuit cases petitioners cite, imposing fiduciary standards on discretionary actions taken in furtherance of a plan termination, are not to the contrary.

Conrail's amendment and termination of the Matched Savings Plan was undertaken in its corporate capacity and petitioners' claims challenge only the terms of the amended Plan. ERISA's fiduciary standards do not apply, as the Third Circuit properly held.

III.

ERISA SECTION 4044(a) IS IRRELEVANT

Petitioners next argue that ERISA section 4044(a), 29 U.S.C. § 1344(a), requires the distribution of the surplus assets to them, and the Third Circuit's opinion conflicts with other Circuit opinions on the point. More specifically, petitioners contend that section 4044(a) necessarily governs the asset allocation because "section (a) is the only provision that can apply to the circumstances of this case involving a non-reversionary plan." *See* Petition at 18.[18] Unfortunately

18. Petitioners' second argument is that Conrail allegedly terminated the Plan and thereafter amended the Plan in violation of §§ 1103(c)(1) and 1344(d)(1). *See* Petition at 15. By permitting a retroactive amendment of the Plan after termination, petitioners maintain that Conrail impermissibly "alter[ed] substantive rights of the pension plan." *Id.* (quoting *Audio Fidelity Corp. v. Pension Benefit Guar. Corp.*, 624 F.2d 513, 517 (4th Cir. 1980). Conrail disputes petitioners' chronology of the relevant events. Nevertheless, the simple answer is that the Conrail Plan never provided for the allocation of the surplus to petitioners, and the timing of the challenged amendments does not alter this indisputable fact. Moreover, aside from whether the petitioners' suggested construction of PBGC regulations would conflict with the statute, it is certain that the PBGC has no authority over "individual account plans," like the Conrail Matched Savings Plan, as petitioners *admit*. *See* 29 U.S.C. § 1321(b)(1). *See also* Petition at 23 ("[T]he Pension Benefit Guaranty Corporation has no direct jurisdiction over these plans.").

for the petitioners, ERISA section 4044(a) provides absolutely no basis for a remedy in their favor.

As a general proposition, section 4044(a) creates a priority order for the distribution of plan assets following termination. 29 U.S.C. § 1344(a).[19] Nevertheless, petitioners' reliance on section 4044(a) is misplaced because all of the relevant obligations set forth in that subsection were satisfied, with the allocation of assets or the payment of benefits promised the petitioners, consistent with the Plan's terms. First, section 4044(a)(1) requires the allocation of "each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions." 29 U.S.C. § 1344(a)(1). It is undisputed that the surplus assets were not derived from participant contributions and the petitioners received all of the contributions to their individual accounts. Similarly, subsection (a)(2) next requires the payment of "that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions." 29 U.S.C. § 1344(a)(2). There were no mandatory contributions. Section 4044(a)(3) speaks to those benefits "payable as an annuity," and has no relevance here. 29 U.S.C. § 1344(a)(3).

Next, subsections (a)(4) and (a)(5) allocate only benefits "under the plan." 29 U.S.C. §§ 1344(a)(4) and (a)(5). Petitioners have been given all of their Plan benefits and, as such, neither subsection (a)(4) nor (a)(5) can form the basis for relief. Subsection (a)(6) similarly allocates "all other benefits under the plan." 29 U.S.C. § 1344(a)(6). As

19. *Cf. Mead Corp. v. Tilley*, 490 U.S. 714, 717 (1989) ("Title IV of ERISA requires that plan assets be distributed to participants in accordance with the six-tier allocation set forth in § 4044(a), 29 U.S.C. § 1344(a).").

explained in the accompanying note, this Court has given a literal reading to the "benefits under the plan" language of subsections (a)(4), (a)(5) and (a)(6) and these petitioners, fully vested in their individual account balances, can find no comfort in those provisions.[20] Simply stated, "§ 4044(a) is a distribution mechanism and not a source for new entitlements." *Mead*, 490 U.S. at 722. In sum, petitioners have received all of the money promised them and a careful reading of ERISA section 4044(a) demonstrates no basis for a remedy.[21]

IV.

A REPEALED REGULATION AND AMORPHOUS EQUITABLE CONSIDERATIONS CANNOT UPSET THE PLAN LANGUAGE

Petitioners next argue that a repealed regulation and principles of "equitable proration" require the distribution

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20. Although cited by petitioners, this Court's ruling in *Mead* further explains that the language in subsections (a)(4), (a)(5) and (a)(6) guarantees only the benefits expressly provided in a plan document and creates no new rights to benefits:

> Section 4044(a) in no way indicates an intent to confer a right upon plan participants to recover unaccrued benefits. On the contrary, the language of § 4044(a)(6) — "benefits *under the plan*" — can refer only to the allocation of benefits provided by the terms of the terminated plan.

Mead, 490 U.S. at 722 (emphasis added).

21. *Cf. Jacobson*, 119 S. Ct. at 760 ("And where the statutory language provides a clear answer, [the analysis] ends there as well.").

of the surplus to them. As to the former, this Court is bound to follow "the law in effect at the time it renders its decision." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994) (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)). Assuming PBGC regulations properly play some role in this inquiry (*see supra* at 18 n.18), rather than rely on a regulation repealed long before Conrail amended the Plan, this Court should note the current PBGC regulation requiring distribution of plan assets in such a manner to ensure the continuing tax qualification of a plan. 29 C.F.R. § 4044.4(a) (plan sponsor must adhere to ERISA section 4044 "except as may be required to prevent disqualification of the plan under the Code and regulations thereunder"). The PBGC regulations cannot form the basis for further review of the Third Circuit's ruling.

Amorphous equitable considerations are similarly irrelevant to the task at hand. As should now be clear, the terms of a benefit plan are left to the plan sponsor and, absent some specific prohibition in ERISA, those terms cannot be set aside. *See supra* at 11-12. Recognizing the primacy of plan documents, ERISA further commands that a fiduciary "shall discharge his duties . . . in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). In sum, vague considerations of fairness cannot upset the specific and controlling Plan language. Were it otherwise, a plan sponsor's power to delimit both eligibility for benefits and the content and level of those benefits, the bedrock of so much of this Court's ERISA jurisprudence, would be undermined, if not eliminated entirely.[22]

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22. The need to circumscribe ERISA in recognition of a plan sponsor's authority to determine a plan's terms was further stated in *Mertens*. Resolving the question whether a remedy is available (Cont'd)

V.

THE PARTIAL TERMINATION RULES ARE INAPPOSITE

Petitioners next argue that a partial termination of the Plan occurred, as a result of the departure of Conrail employee through the years, requiring, once again, the re-distribution of the Plan surplus to them. Unfortunately for the petitioners, a close reading of the relevant statutory provision demonstrates the absurdity of their argument. Petitioners necessarily rely on Internal Revenue Code section

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(Cont'd)
against non-fiduciaries for harm occasioned by their participation in a fiduciary breach, this Court explained that "[t]he issue is whether the statute affirmatively *authorizes* such a suit." 508 U.S. at 255 n.5 (emphasis in original). *See also Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1190 (7th Cir. 1994) ("At all events, because ERISA is a highly technical statute our part is to apply it as precisely as we can, rather than to make adjustments according to a sense of equities in a particular case.") (Easterbrook, J.). Petitioners' reliance on *Rinard v. Eastern Co.*, 978 F.2d 265 (6th Cir. 1992), is also misplaced. *Rinard* involved competing claims of participants and the plan sponsor of a defined benefit pension plan to surplus remaining after satisfaction of ERISA section 4044(a). Assuming *Rinard* remains good law after *Jacobson*, the opinion holds that employer reversion of surplus is proper only in the event of a clear plan provision for such a reversion and speaks nothing of whether Conrail could expressly allocate the surplus ESOP assets to one group of participants as opposed to another. Again, there was no reversion to Conrail, CSX and/or NS. *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376 (D.C. Cir. 1998), holds only that ERISA section 208 affords participants no right to plan assets in the context of a "spin-off" of the assets and liabilities of a defined benefit pension plan, and the passing reference to ERISA section 4044 was, at best, *dictum*. *Id.* at 1380.

411(d)(3) requiring, for a pension plan to be tax qualified under Revenue Code section 401(a), a recitation in the Plan that:

> Upon its termination or partial termination . . . the rights of all affected employees to *benefits accrued to the date of such termination, partial termination*, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, *are nonforfeitable*.

26 U.S.C. § 411(d)(3) (emphasis added). Adhering to the clear language of the statute, the Third Circuit affirmed the dismissal of petitioners' partial termination claims because petitioners "were fully vested in the balance in their accounts when they were laid off." *See* App. at 11a. As next explained, the Third Circuit's ruling was entirely correct, and does not require this Court's further review.

For present purposes, suffice it to say that the partial termination provision in the Internal Revenue Code works to avoid a potential inequity arising, as petitioners here alleged, after a substantial decline in an employee population. Upon a showing of a sufficient decrease in the workforce, the statute operates to immediately vest participants in their accrued benefits to date, to prevent an employer from enjoying the tax advantages of sponsoring a pension plan, while paying none of the benefits accrued until the partial termination. "This provision [section] 411 is intended to prevent employers from maintaining pension plans for the purpose of deferring income, and thereby reducing their taxes, rather than for the purpose of providing retirement benefits for employees." *Bruch v. Firestone Tire & Rubber*

Co., 828 F.2d 134, 151 (3d Cir. 1987), *rev'd on other grounds*, 489 U.S. 101 (1989).[23]

The simple answer to petitioners' partial termination argument is found in the express language of section 411(d)(3). As quoted above, the statutory provision deems "nonforfeitable," or vested,[24] the "benefits accrued to the date of such . . . partial termination." 26 U.S.C. § 411(d)(3). The plain language of section 411(d)(3) requires the vesting only of "benefits accrued" until the date of the partial termination and cannot form the basis of a right to the ESOP surplus, as every Circuit Court construing the provision has held. In other words, "a partial termination may accelerate vesting of benefits that have already accrued or been credited to the employee," but does not create new rights to additional benefits. *Independent Constr. Equip. Union v. Hyster-Yale*, 83 F.3d 930, 934 (7th Cir. 1996).[25]

Stated differently, the partial termination provision has:

> nothing whatever to do with the rights of fully vested employees like the plaintiffs in this case,

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23. *See also Gluck v. Unisys Corp.*, 960 F.2d 1168, 1182 (3d Cir. 1992) ("[T]he vesting requirement of section 411 helps to ensure that employees get their expected benefits.").

24. The terms "vested" and "nonforfeitable" are synonymous. *Nachman*, 446 U.S. at 376; *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1523 (3d Cir. 1988).

25. *See also Administrative Comm. of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson*, 164 F.3d 981, 984 (6th Cir. 1999) ("In this event, the terminated employees become fully vested and are entitled to retain their full account balances irrespective of the years they actually served.").

> and we are at a loss to understand plaintiffs' argument that these provisions somehow require the Plan to give them benefits they do not claim are provided by the other terms of the Plan.

Ashenbaugh, 854 F.2d at 1525. Because petitioners were fully vested in their benefits, *i.e.*, the assets in each of their individual accounts, Internal Revenue Code section 411(d)(3), by its terms, cannot form the basis for a remedy in their favor. In sum, "[i]f the intent of Congress is clear that is the end of the matter." *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-42 (1984).[26]

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26. Were the plain language of the statute somehow insufficient to point up the futility of petitioners' argument, this Court need look no further than the case law upon which petitioners rely:

> . . . we conclude that plaintiffs' rights to a *pro rata* share of residual or surplus assets must rest on some provision of the plan itself, and not merely on section 4044(d)(1) or section 411(d)(3).

Borst v. Chevron Corp., 36 F.3d 1308, 1317 (1994). Moreover, petitioners misstate the Treasury regulation they cite, claiming that the provision requires allocation to them of the money "from the suspense account." *See* Petition at 21. Quite incredibly, the very language petitioners quote is part of a specific *exemption* from the allocation of ESOP assets segregated to ensure compliance with Internal Revenue Code section 415 and cannot support petitioners' cause:

> [T]his subdivision shall not require such plan to provide for allocations *from the suspense account* to the extent that such allocations would result in annual additions to participants' accounts in excess of amounts permitted

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CONCLUSION

Petitioners' claims were properly dismissed and the decisional conflicts they describe are illusory. The petition should be denied.

Respectfully submitted,

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(Cont'd)

> under section 415 for the year for which such allocations would be made.

26 C.F.R. § 1.411(d)-2(a)(2)(i) (emphasis added). Moreover, and as the Third Circuit further noted, the plain language of the regulation excuses the allocation of surplus assets to participant accounts where benefit liabilities have been satisfied, 26 C.F.R. § 1.411(d)-2(a)(2)(iii), petitioners' inscrutable arguments notwithstanding. In any event, the Internal Revenue Service specifically found this transaction would permit the Plan to remain tax-qualified; hence, petitioners' reliance on Treasury regulations is obviously misplaced.